SUPREME COURT, U.S.
MAR 17 1993
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No. 92-1209

# In the Supreme Court of the United States

OCTOBER TERM, 1992

LAWRENCE M. BAREFORD, ET AL., PETITONERS

*v.*

GENERAL DYNAMICS CORPORATION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals correctly affirmed the dismissal of petitioners' tort claims arising out of an Iraqi missile attack on the *U.S.S. Stark* in order to protect against the disclosure of military secrets.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-15a) is reported at 973 F.2d 1138. The opinion of the district court (Pet. App. 16a-34a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on September 16, 1992. A petition for rehearing was denied on October 14, 1992. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on January 12, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. On May 17, 1987, an Iraqi F-1 Mirage fighter fired two Exocet missiles at the *U.S.S. Stark*. At the time of the attack, the *Stark* was on patrol in the Persian Gulf. The attack killed 37 crewmen and wounded 62 others. In the ensuing diplomatic exchanges, Iraq apologized for the attack and agreed to provide $27,350,374 in compensation for claims arising out of the deaths of the 37 crewmen. Iraq transferred that amount to the United States, and the United States distributed it to the individual beneficiaries of the settlement. Pet. App. 4a, 18a.

In June 1987, the Navy concluded its formal investigation into the attack on the *Stark*. The Navy concluded that the damage to the *Stark* was caused principally by failures of the captain and watch team. The Navy further concluded that the *Stark*'s weapons systems were capable of complying with the applicable rules of engagement and defending against hostile intent and imminent danger. Pet. App. 4a.[1]

2. Petitioners are the representatives of crew members of the *U.S.S. Stark* killed or injured in the Iraqi missile attack. In April 1990, they filed this action against General Dynamics Corporation and 28 other corporate defendants. Petitioners alleged that

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[1] The unclassified version of the Navy's report is part of the record in this case. The classified version of the report was submitted to the district court for its *in camera* review. The district court also reviewed *in camera* an affidavit of Vice Admiral Kihune and a memorandum discussing the accident reports and Admiral Kihune's affidavit. The court of appeals did not review any of these documents. The United States will make the documents available for the Court's review upon request.

defendants had negligently manufactured and tested the Phalanx Anti-Missile System and other defense and radar systems aboard the *Stark*, and had concealed test results. Petitioners claimed that the deaths and injuries of crew members resulting from the Iraqi attack were proximately caused by defendants' tortious conduct. Pet. App. 4a.

The United States intervened and moved for dismissal of plaintiffs' action in order to protect against the disclosure of state secrets. The Secretary of the Navy submitted a declaration formally asserting the privilege. The Secretary identified two types of classified information that might be compromised by trial of plaintiffs' tort claims: (1) classified information relating to the *Stark*'s rules of engagement and (2) classified technical information concerning the *Stark* and its weapons systems. See Pet. App. 22a.[2]

In response, petitioners filed numerous affidavits in an effort to establish a prima facie case of negligence and causation on the basis of assertedly unclassified material. Petitioners relied principally on the declaration of Glenn R. Brindel, the captain of the *Stark* at the time of the Iraqi attack, who asserted that the *Stark* would have defended itself successfully but for flaws in its equipment. Petitioners also introduced an affidavit from James Webb, Jr., a former Secretary of the Navy, who offered his opinion that allowing

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[2] The United States filed the same declaration in *Zuckerbraun* v. *General Dynamics Corp.*, 935 F.2d 544 (2d Cir. 1991). The declaration is reprinted as an appendix to the Second Circuit's opinion in *Zuckerbraun*. It is also reprinted as an appendix to the Brief in Opposition of respondents General Dynamics Corp., *et al.*

petitioners' suit to go forward would not endanger national security. See Pet. App. 23a.

3. The district court concluded that dismissal of the plaintiffs' claims was necessary to protect against the disclosure of military and state secrets. Pet. App. 16a-34a. The court explained that in order to prove their case, the plaintiffs would have "to delve into the specifications and capabilities of the radars and other defense systems, the crucial details of which are classified." Pet. App. 28a. The court also explained that, to establish proximate cause, the plaintiffs would be required to examine the conduct of the crew of the *Stark*, including the applicable rules of engagement. The court noted that the rules of engagement are classified. *Ibid.*

The district court rejected plaintiffs' contention that dismissal was premature. The court concluded that any attempt to establish a prima facie case would involve witnesses who "have had access to classified information and are prohibited from disclosing that information." Pet. App. 29a. The court concluded that "[t]here is an obvious risk that they may inadvertently reveal details which are classified and should not be disclosed." *Ibid.* The court considered and rejected proposals for an *in camera* trial and similar suggestions advanced by petitioners because of the significant risk of disclosing state secrets. *Ibid.*

4. The court of appeals affirmed. Pet. App. 3a-15a. The court observed that the usual effect of the state secrets privilege is to exclude the privileged information from the case. Pet. App. 5a-6a. The court noted, however, that assertion of the privilege may require dismissal if the non-privileged information is not

sufficient to make out a prima facie case, or if "the very subject matter of plaintiff's action is a state secret." Pet. App. 6a, citing *Farnsworth Cannon, Inc.* v. *Grimes*, 635 F.2d 268, 274 (4th Cir. 1980).

The court concluded that petitioners could not make out a prima facie case without access to classified information. Pet. App. 7a-9a. The court acknowledged that petitioners submitted some 2,500 pages of affidavits and documents that they assert do not contain any classified information. But the court concluded that this evidence was not sufficient to establish a prima facie case. The court observed that petitioners' "claim of manufacturing and design defects requires proof of what the Phalanx system was intended to do and the ways in which it fails to accomplish these goals." Pet. App. 9a. The court concluded that "[t]his question cannot be resolved without access to detailed data regarding 'the design, manufacture, performance, functional characteristics, and testing of these systems.'" *Ibid.*, quoting *Zuckerbraun*, 935 F.2d at 547.

The court of appeals further concluded that a trial would jeopardize the integrity of important military secrets, and that, consequently, dismissal would have been required even if petitioners had been able to make out a prima facie case on the basis of unclassified evidence. Pet. App. 10a-14a. The court found a significant danger that witnesses would divulge privileged material "because the privileged and nonprivileged material are inextricably linked." Pet. App. 13a. Finally, the court held that "[n]o intermediate solution * * * can fully protect the United

States' interest in keeping state secrets undisclosed." [3] Pet. App. 14a.

## ARGUMENT

Petitioners contend (Pet. 7-19) that the Court should grant review to resolve conflicts in the courts of appeals over application of the military and state secrets privilege. Contrary to petitioners' contention, the decision of the court of appeals in this case does not conflict with any decision of this Court or any other court of appeals. The only other court of appeals to have considered tort claims arising from the attack on the *Stark* held that dismissal was required to avoid a significant risk to military secrets crucial to the national security. *Zuckerbraun* v. *General Dynamics Corp.*, 935 F.2d 544 (2d Cir. 1991). Accordingly, no further review is warranted.

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[3] The court noted that "[m]ost courts * * * have adopted the position that, if privileged information would establish a valid defense, then the court ought to dismiss the plaintiff's case." Pet. App. 10a (citing cases). But the court recognized that it did not need to reach that issue to decide this case, and therefore declined to address it. Similarly, the court of appeals declined to address the district court's alternative ruling that petitioners' claims present non-justiciable political questions. Pet. App. 14a.

The court of appeals rejected petitioners' arguments based on the *in camera* proceeding in the district court. Pet. App. 14a-15a. The court observed that its decision did not rest on any of the materials produced at the *in camera* proceeding, and consequently any error that may have infected that proceeding was harmless. Pet. App. 15a. Petitioners do not pursue those issues in this Court.

1. The military and state secrets privilege protects the Nation's vital interest in preserving military and diplomatic secrets. The existence of the privilege is well established. See *United States* v. *Reynolds*, 345 U.S. 1, 6-7 (1953); *Totten* v. *United States*, 92 U.S. 105, 107 (1876); *United States* v. *Burr*, 25 F. Cas. 30, 37 (C.C.D. Va. 1807) (No. 14,692d) (Marshall, C.J.) ("That there may be matter, the production of which the court would not require, is certain."). In *Reynolds*, the Court set out "the principles which control the application of the privilege." 345 U.S. at 7. The privilege belongs to the United States; it cannot be asserted or waived by a private party. The privilege must be formally asserted by the head of the department with control over the protected information after personal consideration by that officer. Ultimately, "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege," but it must do so "without forcing a disclosure of the very thing the privilege is designed to protect." *Id.* at 8.

The Court noted in *Reynolds* that "[w]here there is a strong showing of necessity, the claim of privilege should not be lightly accepted." 345 U.S. at 11. The Court concluded, however, that "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." *Ibid.* The Court observed that in *Totten* v. *United States*, *supra*, the action was dismissed on the pleadings because "the very subject matter of the action * * * was a matter of state secret" and consequently it was "obvious that the action should never prevail over the privilege." 345 U.S. at 11 n.26. See also *Ellsberg* v. *Mitchell*, 709

F.2d 51, 57 (D.C. Cir. 1983) ("When properly invoked, the state secrets privilege is absolute. No competing public or private interest can be advanced to compel disclosure of information found to be protected by a claim of privilege."), cert. denied, 465 U.S. 1038 (1984). Accord *Zuckerbraun*, 935 F.2d at 946-947; *Northrop Corp.* v. *McDonnell Douglas Corp.*, 751 F.2d 395, 399 (D.C. Cir. 1984); *Halkin* v. *Helms*, 690 F.2d 977, 990 (D.C. Cir. 1982) (*Halkin II*).[4]

2. The Secretary of the Navy properly invoked the military and state secrets privilege in this case.[5] There can be no serious dispute that classified information concerning the design, performance, and characteristics of the *Stark* is protected by the military and state secrets privilege. As Secretary Garrett's declaration explains, the *Stark* is the most advanced frigate in the United States Navy. The *Stark* and its sister ships form the largest class of

[4] Petitioners contend (Pet. 16-19) that dismissal of their claims violated their constitutional right of access to the courts. But this Court has never understood that right as conferring on plaintiffs in civil actions an absolute entitlement to proceed to trial despite a serious risk that trial would compromise vital military or state secrets. *Reynolds* and *Totten* are inconsistent with petitioners' extravagant conception of the right of access to the courts.

[5] The Secretary's declaration "provide[d] a lengthy and detailed description of the subject matter of the classified information, * * * and explain[ed] that use of this information in litigation would be inimical to the national security." *Zuckerbraun*, 935 F.2d at 547. Although petitioners nevertheless assert (Pet. 12) that the Secretary made "bare assertions" of the privilege in a "conclusory" affidavit, they "cannot seriously contest the fact that the privilege was properly invoked," 935 F.2d at 547.

surface combat ships in the Navy, and "are expected to be the United States' primary class of frigates well into the 21st century." Declaration of H. Lawrence Garrett, III, reprinted in *Zuckerbraun*, 935 F.2d at 548.

The *Stark*'s rules of engagement also are subject to the military secrets privilege. The rules of engagement determine the circumstances in which U.S. forces may employ weapons and defensive systems, and the extent to which they may employ them. As the Second Circuit concluded in *Zuckerbraun*, "it is self-evident that disclosure of secret data and tactics concerning the weapons systems of the most technically advanced and heavily relied upon of our nation's warships may reasonably be viewed as inimical to national security." 935 F.2d at 547.

3. Petitioners assert (Pet. 8-9, 18-19) that the court of appeals' decision conflicts with decisions of other courts of appeals adopting procedures short of dismissal to protect military and state secrets. There is no such conflict. As the court of appeals recognized (Pet. App. 5a-6a), the state secrets privilege does not require dismissal if the litigation can proceed without jeopardizing the privileged information. But it is well established that dismissal is necessary if it is clear that a plaintiff cannot prove his claims without threatening to divulge the protected material. In *Totten*, for example, dismissal was required where an intelligence agent sought to recover under an alleged contract with President Lincoln. The Court ruled that "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confiden-

tial, and respecting which it will not allow the confidence to be violated." 92 U.S. at 107. Because litigation of the agent's claim could have resulted in disclosure of privileged military information "to the serious detriment of the public," *id.* at 106-107, the Court affirmed the order of dismissal.

The Fourth Circuit applied that principle in a tort suit between private litigants in *Farnsworth Cannon, Inc.* v. *Grimes*, 635 F.2d 268, 281 (1980) (en banc). The court ruled that dismissal was required at the outset of the litigation because "any attempt on the part of the plaintiff to establish a prima facie case would so threaten disclosure of state secrets that the overriding interest of the United States and the preservation of its state secrets precludes any further attempt to pursue this litigation." In *Fitzgerald* v. *Penthouse Int'l, Ltd.*, 776 F.2d 1236 (1985), the Fourth Circuit again affirmed a dismissal in a suit between private parties because "the nature of proof to be presented" posed "a substantial threat that state secrets will be compromised." *Id.* at 1243. The court noted that dismissal would not be ordered lightly, but recognized that dismissal was required "where, as here, the very question upon which the case turns is itself a state secret." *Id.* at 1239 n.3. See also *Halkin II*, 690 F.2d at 998-999 (affirming dismissal of suit because, without privileged information proving whether plaintiffs' communications were intercepted by government, plaintiffs could not establish standing).

In sum, every court to consider the issue has concluded that dismissal is required where litigation

cannot proceed without significant risk that state secrets will be compromised.[6]

4. Petitioners incorrectly assert (Pet. 12) that the lower courts' "uncritical acceptance" of the government's claim of privilege "represents a relinquishment of the judicial province." That is not so. The court of appeals carefully evaluated the government's claim of privilege and concluded that petitioners could not establish a prima facie case without access to classified information of central importance to the national security. See Pet. App. 8a-9a. As the Second Circuit recognized in *Zuckerbraun*, trial of petitioners' case would require

> access to data regarding the design, manufacture, performance, functional characteristics, and testing of [weapons and defensive] systems and the rules of engagement under which the Stark was operating. This data is in its entirety classified

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[6] In *Boyle* v. *United Technologies Corp.*, 487 U.S. 500 (1988), the Court had no occasion to consider the military and state secrets privilege. Consequently, petitioners' reliance (Pet. 18) on that case is misplaced. Further, *Boyle* itself illustrates the principle established in *Reynolds* that remedies available to private parties must be limited when necessary to accommodate certain overriding federal interests.

Petitioners assert, somewhat inconsistently, that the United States "has selectively chosen to use the privilege as an offensive weapon," and that the "Government now seeks dismissal in every case in which state secrets may be implicated." Pet. 16. Neither assertion is correct. The Government always seeks to protect state secrets, but the decision to seek dismissal is made on a case-by-case basis and turns on the government's evaluation of whether dismissal is required to ensure adequate protection of the state secrets at issue.

> and subject to the claim of privilege. The very subject matter of this action is thus a state secret.

935 F.2d at 547-548. In this case, the court of appeals agreed with the Second Circuit's reasoning and emphasized that "[s]uch an analysis of the capabilities of an advanced Navy frigate's defensive systems is the type of judicial disclosure of state secrets the doctrine blocks." Pet. App. 9a.

The court of appeals correctly concluded that the assertedly unclassified evidence offered by petitioners did not establish a prima facie case of negligence or causation. To establish their affirmative case at trial, petitioners would be required to demonstrate not only the capabilities of the Phalanx System, but also the alleged defects in the system and the rules governing the employment of the Phalanx and other weapons systems. All of that information is classified. In addition, as the Fourth Circuit recognized in *Farnsworth*, litigants at trial "have every incentive to probe as close to the core secrets as the trial judge would permit." 635 F.2d at 281. "In these circumstances, state secrets could be compromised even without direct disclosure by a witness." Pet. App. 11a, quoting *Fitzgerald*, 776 F.2d at 1243. Indeed, even the government's assertion of objections to specific evidence could undermine the privilege. Pet. App. 11a-12a, citing *Fitzgerald*, 776 F.2d at 1243 n.10.[7]

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[7] To be sure, "[c]ourts should accord the 'utmost deference' to executive assertions of privilege upon grounds of military or diplomatic secrets." *Halkin* v. *Helms*, 598 F.2d 1, 9 (D.C. Cir. 1978) (*Halkin I*), quoting *United States* v. *Nixon*, 418 U.S.

5. Petitioners urge that the courts below failed to give full consideration to means of protecting state secrets short of dismissal. On the contrary, the court of appeals expressly considered other means of protecting the privilege and concluded that "[n]o intermediate solution such as those proposed by plaintiffs, as ably and creatively as their counsel has put it, can fully protect the United States' interest in keeping its state secrets undisclosed." Pet. App. 14a. Similarly, the district court concluded that petitioners' "suggestions are unworkable when the case, such as the instant one, encompasses so much classified information." Pet. App. 29a-30a.

In *Reynolds*, the Court observed that even *in camera* scrutiny by the court should be avoided if the court can determine, "from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." 345 U.S. at 10. As the District of Columbia Circuit stated in *Ellsberg* v. *Mitchell*, in rejecting the contention that plaintiff's counsel should have been permitted to participate in *in camera* proceedings:

> It is not to slight judges, lawyers or anyone else to suggest that any such disclosure carries with it serious risk that highly sensitive information may be compromised. In our own chambers, we are ill equipped to provide the kind of security highly sensitive information should have.

683, 710 (1974). Petitioners confuse appropriate judicial deference with the abdication of judicial responsibility.

709 F.2d at 57 n.31, quoting *Clift* v. *United States*, 597 F.2d 826, 829 (2d Cir. 1979) (rejecting contention that district court should have permitted *in camera* discovery with respect to documents subject to the state secrets privilege), quoting *Alfred A. Knopf, Inc.* v. *Colby*, 509 F.2d 1362, 1369 (4th Cir.), certs. denied, 421 U.S. 908 and 421 U.S. 992 (1975).

The courts have likewise recognized that the security of state secrets cannot be adequately guarded by protective orders. As the court emphasized in *Ellsberg* v. *Mitchell*, 709 F.2d at 61, "our nation's security is too important to be entrusted to the good faith and circumspection of a litigant's lawyer (whose sense of obligation to his client is likely to strain his fidelity to his pledge of secrecy) or to the coercive power of a protective order." Accord *Halkin I*, 598 F.2d at 7 ("[p]rotective orders cannot prevent inadvertent disclosure nor reduce the damage to the security of the nation which may result"). See also *Colby* v. *Halperin*, 656 F.2d 70, 73 (4th Cir. 1981) (reversing order that would have permitted an expert witness to divulge certain information to his lawyer on the condition that the lawyer was required to obtain a security clearance).[8]

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[8] The cases cited by petitioners (Pet. 18) are readily distinguishable. In *Loral Corp.* v. *McDonnell Douglas Corp.*, 558 F.2d 1130 (2d Cir. 1977), the court did not consider the scope of the state secrets privilege. In that case, the United States participated as amicus curiae to endorse the district court's decision to strike a demand for a jury trial in a contract suit between two contractors on a classified defense project. In *Northrop*, 751 F.2d at 399-408, the court upheld the state secrets privilege asserted by the Department of Defense but rejected a separate contention by the State Department that a

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1993

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subpoena was overly burdensome. In *Halpern* v. *United States*, 258 F.2d 36 (2d Cir. 1958), the court ordered an *in camera* trial in a patent suit. The court distinguished *Reynolds* and *Totten* on the ground that the patent suit arose under "a specific enabling statute contemplating the trial of actions that by their very nature concern security information," and that the plaintiff would not need to acquire information not already in his possession. 258 F.2d at 44.